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NO. 88-597

In the Supreme Court of the United States

OCTOBER TERM, 1988

CITY OF GRETNA, LOUISIANA, *et al.*,
Petitioners,

versus

CITIZENS FOR A BETTER GRETNA, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Should This Court Grant Certiorari Where the Federal District Court Has Found Each of the Subsidiary Factors Present And Made the Final Factual Determination of Vote Dilution, as Required by This Court's Opinion in Thornburg v. Gingles, and the Court of Appeals Has Ruled That Those Findings Are Supported by Substantial Evidence?

II. Should This Court Grant Certiorari to Review a Court of Appeals Decision Which Applies the Principles of This Court's Recent Opinion in Gingles and Which is Wholly Consistent With Similar Decisions by Other Circuit Courts?

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STATEMENT OF THE CASE

I. Course Of Proceedings In The Courts Below.

On October 9, 1984, Plaintiffs-Respondents, Citizens for a Better Gretna (an unincorporated association concerned with the civil rights of black residents in the City of Gretna, Louisiana) and eleven black residents of the City, filed a class action suit seeking declaratory and injunctive relief on behalf of all present and future black citizens and voters of the City. Defendants (Petitioners before this Court) were the City of Gretna, its Mayor and the five members of the Board of Aldermen, sued both individually and in their representative capacities. (Record [R]: 1).

The complaint alleged that the then-existing system of at-large elec-

tions for the Board of Aldermen resulted in the dilution of the votes of black voters and, therefore, denied or abridged their right to vote and right to participate in the political process and to elect candidates of their choice, all in violation of the U. S. Constitution, amendments XIV, XV; §2 of the Voting Rights Act, as amended, 42 U.S.C. §§1971 et seq. (1982); and 42 U.S.C. §1983 (1982). (R: 7).

On May 12, 1986, the U.S. District Court for the Eastern District of Louisiana (in an opinion[1] by the Hon. Robert F. Collins) held, inter alia:

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1. Respondents urge this Court to refer to the District Court's opinion reported at 636 F.Supp. 1113, as the version included in the Appendix to the Petition for Certiorari is riddled with typographical errors. These errors, which did not appear in the original opinion, make Judge Collins' well-reasoned opinion extremely difficult to read.

> the continuing effect of a majority vote requirement through the use of an "unusually large" election district -- results in the submergence of black registered voters in the City of Gretna as a voting minority with substantially less opportunity than other members of the electorate to participate in the political process, thereby depriving the black voters of their lawful right to elect representatives of their choice.

Citizens for a Better Gretna v. City of Gretna, 636 F.Supp. 1113, 1131 (E.D. La. 1986) (R: 197).

The District Court, therefore, concluded "on the basis of factual findings, that the 'at-large' system of election to the Board of Aldermen in the City of Gretna violates Section 2 of the Voting Rights Act." 636 F.Supp. at 1115 (R: 151). Hence, on November 7, 1986, the District Court rendered its final judgment, which enjoined Defendants-Petitioners from conducting elections un-

der that system (R: 439). On November 18, 1986, the District Court denied Defendants' motion for a new trial, ruling that the court's final judgment was "completely consistent with controlling precedent." (R: 447).[2]

The District Court authorized elections for the Board of Aldermen for the City of Gretna, under a 4 single-member, 1 at-large (along with a mayor), districting plan proposed by the City. (R: 511).

On December 23, 1987, the U.S. Court of Appeals for the Fifth Circuit affirmed the District Court's judgments, holding that the factual findings were amply supported by the record and were consistent with the standard set forth in this Court's Gingles opinion, and

2. Of course, at that time the precedents included this Court's opinion in Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).

with other precedents in the voting rights field. Citizens For A Better Gretna v. City of Gretna, 834 F.2d 496, 502 n.13 (5th Cir. 1987). On June 13, 1988, the Fifth Circuit, without dissent, denied Defendants' motion for rehearing and suggestion for rehearing en banc. Citizens For A Better Gretna v. City of Gretna, 849 F.2d 1471 (5th Cir. 1988).

Defendants-Petitioners then filed the instant Petition with this Court.

II. Statement of the Facts

A. The Electoral System in Gretna

The 1980 U.S. Census revealed that the population of the City of Gretna (in Jefferson Parish, Louisiana) was 20,615 persons, 28 percent of whom were black. (Transcript, Volume 1: Page 105/Line 24, Page 106/Line 2 [TR1: 105/24, 106/2]).

Gretna has a Mayor-Aldermen form of Government pursuant to Louisiana's Lawrason Act. La. Rev. Stat. Ann. §33:321 et seq. (West 1951 and Supp. 1988). Prior to this case, all five aldermen were elected by majority vote in citywide ("at-large") elections, to serve concurrent four-year terms. (TR2: 76/13-18, 77/15-21). There was no requirement that members of the Board of Aldermen reside in different geographical areas of the municipality. (TR2: 76/19-21).

B. The History of Official Discrimination

As a part of its factual findings, the District Court summarized: "The history of black citizens' attempts, in Louisiana since Reconstruction, to participate effectively in the political process and the white majority's resistance to those efforts is one character-

ized by both de jure and de facto discrimination." 636 F.Supp. at 1116 (R: 154). Dr. Raphael Cassimere, Jr.'s unrefuted expert testimony detailed the history of racial discrimination in Louisiana and Jefferson Parish. Following the Civil War, the federally imposed Reconstruction Act allowed the greatest electoral success Louisiana's black citizens have ever enjoyed. (TR1: 78/10-14). White persons in Louisiana, however, responded with organized opposition, including boycotting elections, altering vote counts, and murdering black elected officials and sympathetic whites. (TR1: 78/25-79/9).

After the federal withdrawal from the South, Louisiana enacted a series of disenfranchising measures, causing black voter registration to plummet from 136,000 in 1896 to less than 1,000 in

1910. Most of these measures were ended only after direct intervention by this Court. See, e.g., Louisiana v United States, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965) (striking down "constitutional interpretation" and "good morals" tests as conditions of registration); Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944) (abolishing "white primaries" which effectively operated as the actual election); Guinn v. United States, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915) (invalidating property ownership requirement which "grandfathered" in whites owning no property).

As recently as 1963, Jefferson Parish blacks, unlike whites, were required by the registrar of voters to perform complex mathematical calculations and to recite the preamble to the

Constitution before being allowed to register. 636 F.Supp. at 1117 (R: 157).

Furthermore, all public facilities in Louisiana were racially segregated until 1964. (TR1: 88/20-24). Segregation lasted even longer in education. The quality of education offered to Louisiana blacks in the segregated system was very poor, educational appropriations for blacks were substantially lower than for whites, and salaries of black teachers were less than 35 percent of white teachers. (TR1: 89/5-13, 84/20-22). It was not until 1978 that the Jefferson Parish schools were completely integrated, again with federal court intervention. See 636 F.Supp. at 1118.

C. Gretna's Racially Exclusionary Candidate Slating Process

Dr. Cassimere, Alderman Uzee, and former candidate Edwin Romain testified

regarding the operation of the candidate slating process (the "Miller-White Ticket") in Gretna. (TR1: 94-95, 132-39, 140-147). Judge Collins found: "It is extremely difficult to win an aldermanic election without the Miller-White endorsement." 636 F.Supp. at 1123 (R: 171-74). He also found that Plaintiffs "presented, very cogently and convincingly, evidence that the black community has been effectively excluded from the informal slating process that is carried on in Gretna." Id.

D. Racial Polarization In Gretna

Similar to Gingles v Edmisten, 590 F.Supp. 345 (E.D.N.C. 1984), aff'd in relevant part, Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), a large portion of the trial in the instant case was devoted to establishing the existence of racial polar-

ization in the voting patterns of Gretna voters. Plaintiffs' expert testimony was based on the identical analysis later approved by this Court in Gingles, 478 U.S. at 52-53.

After reviewing the testimony of both Plaintiffs' and Defendants' experts, the District Court concluded that racially polarized voting was "persistent and severe" among Gretna's voters. See 636 F.Supp. at 1124.

1. The Plaintiffs' Evidence

Dr. Michael McDonald, an expert in political science specializing in electoral politics and statistical methodology, outlined the statistical analysis used to examine the degree of racial polarization. Employing the widely used Statistical Package for the Social Sciences (SPSS), Dr. McDonald performed regression and correlation analyses, as

well as graphic analyses, on the data regarding Gretna voters gathered from the Registrar of Voters. (TR2: 7/2-8).

In order to avoid aggregation bias (and, therefore, ecological fallacy) in these regression analyses, Dr. McDonald also analyzed the level of support for black candidacies in three all-white precincts. (TR2: 25-30, 37-38). Utilizing census data, voter registration rolls, and election returns, Dr. McDonald concluded that no identifiable group of whites, at any socioeconomic level, have supported black candidates in Gretna elections. (TR2: 36/6-16; see generally TR2: 29-36).

Dr. Richard Engstrom, an expert in political science particularly in the areas of urban and minority politics (TR2: 76/2), also testified regarding the existence of racially polarized vot-

ing in Gretna. (TR2: 94/1). His report, based upon the statistics prepared by Dr. McDonald, examined three elections (in 1973, 1977, and 1979) in which black candidates ran for the Board of Aldermen. (TR2: 85-86).

The 1979 Gretna Aldermanic Election

Dr. Engstrom testified that the 1979 aldermanic election revealed that, as the percentage of blacks in the population rose, the percentage of votes for Mr. Jones also consistently increased. (TR2: 88/18-22). The unweighted regression analysis revealed that only one percent of the voters in an all-white precinct voted for Jones (TR2: 90/7-10), but that Jones received 60 percent of the votes cast by black persons. (TR2: 93/17). A "weighted" regression analysis of the 1979 election revealed nearly identical results -- Jones received 0.9

percent of the white vote and 65.7 percent of the black vote. (TR2: 95/6-10).

Dr. Engstrom also analyzed three homogeneous white precincts in Gretna. (TR2:95/16). Out of 1,458 votes cast in these white precincts, Jones received only 22 votes, or 1.5 percent. (TR2: 95/21-96/2). Dr. Engstrom calculated that in the two majority black precincts, Jones received 65.9 percent of the black votes cast. (TR2: 96/22-98/1).

The 1977 Gretna Aldermanic Election

Dr. Engstrom analyzed the 1979 aldermanic election, in which Jones again was the sole black candidate. Unweighted regression analysis indicated that Jones received only 11.2 percent of the votes cast by Gretna's whites, but over 65 percent of the black vote. (TR2: 103/17-24). The weighted regres-

sion yielded only slightly different figures. (TR2: 104/6-11). In the three homogeneous white precincts, where only 13 blacks were registered to vote, Jones finished last among twelve candidates in all three precincts. (TR2: 105/22, 106/2-3).

The 1973 Gretna Aldermanic Election

A paucity of data made it impossible to analyze in the same detail 1973 election in which Edwin Romain campaigned. Dr. Engstrom noted, however, that in the runoff election Mr. Romain finished first or second (of six candidates) in the two black majority precincts, but last in all other precincts, and, therefore, finished last in the election. (TR2: 85/20, 107/ 9-18).

2. The Defendants' Evidence

Defendants relied heavily on the testimony of Dr. John Wildgen, an expert in political science. (TR3: 75). Dr. Wildgen admitted at trial that he neither conducted any type of regression analysis nor accumulated survey data (which he asserted is more precise than linear regression analysis). (TR3: 87/9-11, 101/24, 103/22). Dr. Wildgen strongly disagreed with Plaintiffs' evidence (TR3: 89-90), but neither he nor anyone else put forward any evidence at trial to refute Plaintiffs' evidence. (TR3: 103/18-24, 141/2). Dr. Wildgen contended that Plaintiffs did not prove racial polarization. He stated that racial polarization usually exists where there is a high voter turnout among blacks, with a resulting "white backlash." (TR3: 113/17-114/6).

E. Electoral Practices in Gretna Which Enhance Discrimination Against Blacks

Two Gretna electoral practices enhance racial discrimination. Dr. Engstrom observed that at-large electoral systems dilute minority votes where "voting is racial[ly] polarized" and where "the black population in the political jurisdiction is sufficiently large and sufficiently concentrated so that a fairly drawn single member district plan would provide the black minority with an equal opportunity to elect a candidate of its choice."[3] (TR2: 83/2-10). Dr. Engstrom added that Gretna's majority vote requirement "makes it much more difficult for . . . a minority group's favorite candidate or minority candidates to attain sufficient

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3. This language, of course, is nearly identical to the standard later mandated by this Court in Gingles. See 478 U.S. at 50-51.

votes in order to be elected." (TR2: 80/17-23). His conclusion is widely supported in political science literature. (TR2: 81/9).

F. The Lingering Effects of Past Discrimination

The long, sad history of disenfranchisement, segregation and unequal education in Gretna, Louisiana has engendered effects which continue to this day. In 1980, the median family income for Gretna whites was $18,524, but for black families was $9,721 (i.e., 52 percent as much). (TR1: 109/13-15). More than 34 percent of Gretna's black families have incomes below the poverty level, compared to only 9.7 percent of their white counterparts. Moreover, 60 percent of Gretna's blacks over age 25 have no high school education, while the comparable figure for whites is only 46 percent. (TR1: 109-110). The District

Court found that "Blacks are consistently concentrated in low income areas and are conspicuously absent from the more affluent areas of Gretna. The evidence presented at trial further shows that the City of Gretna has done little to help alleviate this problem." 636 F.Supp. at 1118 (R: 160). This combination of past discrimination and current depressed socioeconomic conditions contributes significantly to low black voter turnout. (TR1: 118/5-119/2).

G. Lack of Electoral Success by Blacks in Gretna

From the City's creation in 1913 until the districting mandated by the court in this case, no black was ever elected to the Gretna Board of

Aldermen.[4] 636 F.Supp. at 1134 (R: 167; see also TR1: 93/23-94/1). No blacks were elected in Jefferson Parish prior to the adoption of the Voting Rights Act. (TR1: 91/11). Indeed, from the turn of the century until then, blacks "had no impact on the political process . . . [T]hey did not have any say so as to who governed their lives." (TR1: 90/20-22) (Dr. Cassimere).

SUMMARY OF THE ARGUMENT

This is a straightforward, classic case of the type Congress envisioned when it adopted the Amendments to the Voting Rights Act in 1982. The City of Gretna has a 28 percent black population and, despite numerous attempts, no black person was ever elected to the Board of

4. In May 1987, after the District Court's imposition of the districting plan proposed by the City, Leo Jones, the first black Alderman in the City's history, was elected to represent the majority black district.

Aldermen under the at-large election system. The District Court found that the confluence of past discrimination, the at-large system, an exclusionary candidate system, and racial bloc voting resulted in the dilution of the votes of Gretna's black citizens, in violation of §2.

The Court of Appeals for the Fifth Circuit reviewed all of the evidence on both sides, under the standards mandated by this Court in its recent opinion in Thornburg v. Gingles. The Fifth Circuit concluded that the District Court had applied the correct legal standard, and that the subsidiary findings of fact and final factual conclusion were well-supported by the evidence. Both opinions below relied upon statistical analysis of the type recently approved by this Court in Gingles, and they drew

upon the elections and the candidacies which have been uniformly used in other voting rights cases throughout the country.

The Petition raises no important issues worthy of this Court's valuable time. There has been no change in the law which would require a remand, and there is no conflict among the Courts of Appeals. Hence, there is no reason to grant certiorari.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The District Court Was Clearly Correct In Its Analysis Of The Facts Of This Case And The Law Of The Voting Rights Act, As Amended.

Petitioners would have this Court reexamine the factual determinations of the District Court regarding racially polarized voting. In fact, they repeatedly have attempted to relitigate these fact-bound issues: in their appeal to

the Fifth Circuit; in their petition for rehearing and suggestion of rehearing en banc; and now in their Petition for Certiorari before this Court. At each point their claims have been rejected without dissent. Respondents urge this Court to decline to upset the well-supported factual findings.

A. Fed. R. Civ. P. 52 Protects A District Court's Factual Findings, Especially in the Fact-Bound Inquiries Required in Voting Rights Cases.

Rule 52(a) of the Federal Rules of Civil Procedure provides, inter alia: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous." In vote dilution cases, the "clearly erroneous" rule is the standard of review, not only as to each of the subsidiary factual elements but also to the ultimate determination regarding vote dilu-

tion. Thornburg v. Gingles, 478 U.S. 30, 78, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). Applying this very deferential standard of review to "findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law." 478 U.S. at 79. See also Rogers v. Lodge, 458 U.S. 613, 622-23, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982) (determination whether at-large electoral system maintained for a discriminatory purpose is governed by Rule 52).

As this Court has stated, the factual findings of the trial court represent "a blend of history and an intensely local appraisal of the design and impact of . . . the multimember district in the light of past and present reality, political and otherwise."

White v. Regester, 412 U.S. 755, 769-70, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973) (emphasis added), reaffirmed in Gingles, 478 U.S. at 78.

B. The District Court Employed the Correct Legal Standard for §2 Cases.

Petitioners claim that the Constitution entitles them to a remand[5] because this Court remanded Collins v. City of Norfolk, 478 U.S. 1016, 106

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5. Petitioners assert that to deny a remand in this case is "to deny [the City of] Gretna equal protection." Pet. for Cert. 7 n.5. But, the Equal Protection Clause "protects people, not States." Pennsylvania v. New Jersey, 426 U.S. 660, 665, 96 S.Ct. 2335, 49 L. Ed. 2d 124 (1976). Nor do state subdivisions, e.g. cities, have Equal Protection rights. See, e.g., Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 39, 53 S.Ct. 431, 77 L.Ed. 1015 (1933); City of Newark v. New Jersey, 262 U.S. 192, 196. 43 S.Ct. 539, 67 L.Ed. 943 (1923); Williams v. Eggleston, 170 U.S. 304, 309, 18 S.Ct. 617, 42 L.Ed. 1047 (1898). Hence, the City cannot invoke the Equal Protection Clause to justify an electoral structure which has been invalidated as racially discriminatory.

S.Ct. 3326, 92 L.Ed. 733 (1986), for reconsideration in light of Gingles. In Collins, the District Court wrongly relied upon a definition of racial polarization based upon "white backlash" and high black turnout. 605 F.Supp. at 386, 388.[6] (Interestingly, that definition, rejected by this Court in Gingles, is the very one urged by Defendants' expert witness in the instant case. (TR3: 113/7-114/6).). The Fourth Circuit affirmed, in an opinion handed down before Gingles. Collins, 768 F.2d 572, 576 (4th Cir. 1985). Hence, remand was necessary in Collins so the District Court

6. The Collins court wrongly rejected a definition of racially polarized voting as "when the majority of one racial group votes contrary to the majority of another racial group." Collins, 605 F.Supp. 377, 386 (E.D. Va. 1984). In other words, the Collins court wrongly rejected a definition quite similar to the one approved by this Court in Gingles. See 478 U.S. at 48 ("where minority and majority voters consistently prefer different candidates").

could apply the correct racial polarization standard. Collins v. City of Norfolk, 816 F.2d 932, 936 (4th Cir. 1987) (on remand).

By contrast, the opinion of the District Court in the instant case, though issued prior to Gingles, rejected the incorrect test, and applied the correct racial polarization standard, as derived (like Gingles) from the language and legislative history of the 1982 Amendments. Defendants also brought Gingles to the District Court's attention in their motion for a new trial. That court found its opinion well within this Court's mandate and denied the motion. Furthermore, unlike the Court of Appeals in Collins, the Fifth Circuit rendered its opinion well after Gingles. Indeed, the Fifth Circuit was able to conclude that the District Court had an-

ticipated[7] Gingles in several important respects, and the Fifth Circuit itself carefully analyzed the evidence based upon the Gingles opinion. See Gretna, 834 F.2d at 497. Petitioners' reliance upon the procedural posture of Collins is, therefore, misplaced

II. The Opinions Of The Courts Below Rested Firmly Upon The Voting Rights Act (As Amended), Its Legislative History, And Its Authoritative Interpretation By This Court.

Congress amended §2 of the Voting Rights Act in 1982 to increase the opportunity for members of racial and language minorities, including Respondents in the instant case, to participate equally with "other members of the electorate" and "to elect candidates of

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7. The District Court seemed to have benefited from the good fortune of having Dr. Richard Engstrom as Plaintiffs' expert witness, whose analysis of §2 claims this Court found helpful in Gingles. See 478 U.S. at 53 n.20, 55.

their choice." The 1982 Amendments were specifically designed to clarify the standard of proof required to establish a §2 violation, see 127 CONG. REC. 23,175 (1981) (remarks of Rep. Sensenbrenner), and to relieve plaintiffs of "the impossible burden," see 127 CONG. REC. 23,176-77 (1981) (remarks of Rep. Edwards), of proving purposeful voting discrimination against racial and ethnic groups. See generally Blacksher, Drawing Single-Member Districts to Comply with the Voting Rights Amendments of 1982, 17 Urb. Law. 347, 347-53 (1985).

When this Court, in Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), first considered the

effect of the 1982 Amendments, it[8] turned to the principal source of guidance provided by Congress -- the Senate Report. S. Rep. No. 417, 97th Cong., 2d Sess., reprinted in 1982 U.S. CODE CONG. & AD. NEWS 177 [hereinafter "S. Rep."].

The Senate Report lists nine illustrative factors for courts to consider when analyzing a claimed violation of §2. This Court noted that the list "is neither comprehensive nor exclusive. . . . '[T]here is no requirement that any particular number of factors be proved, or that a majority of them point

8. Justice Brennan authored a five-part majority opinion, four parts of which were joined by Justices Marshall, Stevens, Blackmun, and White. Although this Court certainly requires no assistance in tallying its own votes, we provide this brief commentary solely to demonstrate that Petitioners have misread and miscounted the votes in Gingles with regard to issues critical to their position. See Pet. for Cert. 13, 21.

one way or the other'." Gingles, 478 U.S. at 45, quoting S.Rep. 29-30.

A. The District Court Found That Plaintiffs Satisfied The "Totality Of Circumstances" Test, and the Fifth Circuit Rightly Affirmed.

1. Plaintiffs Proved The Existence Of The Three Principal Factors.

To prove a violation of §2, i.e., vote dilution, plaintiffs first must demonstrate a conjunction of three circumstances. First, the minority group must be "sufficiently large and geographically compact to constitute a majority in a single member district." Second, the minority group must be "politically cohesive." Finally, the white majority must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate. Gingles, 478 U.S. at 30.

The first factor is not at issue here. The district plan proposed by the City after the judgment of the District Court included a majority black district. The court approved that plan. In 1987, when Leo Jones was elected from the district, he became the first black person ever elected to the Gretna Board of Alderman.

The second and third factors --minority political cohesion and white bloc voting -- are two measures of racially polarized voting, which occurs "where minority and majority voters consistently prefer different candidates." 478 U.S. at 48. In an at-large or multimember electoral system where there is racial bloc voting, "the majority, by virtue of its numerical superiority, will regularly defeat choices of minority voters.". Id. Racial bloc voting

"'allows those elected to ignore [minority] interests without fear of political consequences'." Id., n.14, quoting Rogers v. Lodge, 458 U.S. 613, 623, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982).

Even Defendants' expert witness has explained, in a similar context:

> [I]t should come as a surprise to no one save the most ingenuous that multi-member districts are intimately connected with Louisiana's racial problem . . . . [The State] create[d] large districts in which the black minority becomes diluted by the overwhelming numbers of white suburbanites.

Wildgen, Measuring Malapportionment in Louisiana, 16 Loyola L.Rev. 383, 394-95 (1969-70).

Contrary to Petitioners' assertion, it is inappropriate to focus solely upon minority political cohesion and the motivations behind minority support for

candidates. Instead, the analysis should turn upon an inquiry into the majority's voting patterns. This inquiry is necessary to determine a violation of §2, i.e., whether the white electorate votes as a bloc, thereby usually preventing the success of the minority-preferred candidate. District Judge Collins, in a rather prescient analysis, anticipated this Court by fashioning a racial polarization standard remarkably similar to, and totally consistent with, the approach later mandated by this Court in Gingles.

The only complete data available on Gretna elections cover the post-1975 period.[9] Consequently, only two elections in which blacks ran for alderman are ca-

9. The 1973 aldermanic election was qualitatively analyzed by the testimony of unsuccessful black candidate Edwin Romain, and Plaintiffs' expert, Dr. Engstrom. See Statement of the Facts, above.

pable of detailed quantitative analysis by anyone. As demonstrated at trial, these 1977 and 1979 election results[10] reveal that, precinct by precinct, black Gretna residents voted for black candidates at a rate of 60 to 67 percent, while white residents voted for black candidates at rates as low as 0.9 percent and no higher than 12 percent.

Leo Jones, a black person, was twice a viable and legitimate candidate, 636 F.Supp. at 1128 (R: 168). He received a majority of the votes cast by Gretna's black voters, but little or no support from white voters. 636 F.Supp. at 1128 (R: 184-190). These data demonstrate a large discrepancy between the

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10. The 1979 data analyzed by Dr. McDonald were unique in their detail, as figures on actual turnout, by race, were maintained by the Registrar of Voters during the relevant period. See TR2: 28/17.

voting patterns of white and black voters.

The District Court also examined, but was unimpressed by, the testimony of Defendants' expert, Dr. John Wildgen. The court found that the evidence presented at trial "clearly beli[ed]" Dr. Wildgen's contention that "the elections in which blacks have vied for seats on the Board of Aldermen were not characterized by racial polarization." Id. at 1129-30. Moreover, the court explicitly made a negative determination as to Dr. Wildgen's credibility, noting that "contrary to previous publications and testimony, Dr. Wildgen now contends that regression analysis is inappropriate for measuring racial polarization." Id. at 1130.

The District Court also noted that the inquiry into race as a determinant

of voter preference was of special significance in the instant case, given the operation of the exclusionary candidate slating organization. See Statement of the Facts, above. In the 1973 Gretna aldermanic election, Edwin Romain, a black businessman, was excluded from "a meeting of candidates called by Chief Miller to form the Miller-White slate." Gretna, 636 F.Supp. at 1130. After seeking Chief Miller's endorsement, Romain was told that he was not needed to get the black vote. Nonetheless, he campaigned extensively in white areas of the City. In the primary election, Romain finished high enough to qualify for the runoff election. In the runoff election, however, Romain finished first or second in the majority black precincts, but last in the homogeneous

white precincts, thereby losing the election. Id.

Based on the voluminous evidence, both statistical and narrative, submitted at trial by Plaintiffs, and in the face of no contradictory evidence presented by Defendants, the District Court properly found "a consistently high degree of electoral polarization in Gretna." Id. at 1135.

Petitioners now assert that the Fifth Circuit "inexplicably" ignored the candidacies of two blacks, Sylvester Brown and Larry Napoleon "Boogaloo" Cooper. Pet. for Cert. 16. In fact, the District Court's opinion already had explained that Cooper was "apparently a fringe candidate." 636 F.Supp. at 1126 n.31. See Campos v. City of Baytown, 840 F.2d 1240, 1245 n.7 (5th Cir. 1988) (where minority candidate has support

from neither white nor black voters, it is inappropriate to assume candidate preferred by any group). Furthermore, as Brown had withdrawn from the race before the election, 636 F.Supp. at 1126 n.31, there was absolutely no voting data on his candidacy available for anyone to analyze. See La. Rev. Stat. Ann. §18:502 (West 1981) (when a candidate withdraws, "any votes received . . . shall be null and void and shall not be counted for any purpose").

These factual findings are neither the product of some whimsy by the District Court nor a "mischievous" reading of the Gingles criteria by the Fifth Circuit, as Petitioners suggest. Rather, they are the result of precise and detailed application of the standards of review elucidated by this Court. It is not surprising that the

Fifth Circuit ruled that Judge Collins' decision is completely consistent with Gingles, see Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496, 499 (5th Cir. 1987), as both cases involved review of facts against standards drawn from the language and legislative history of the statute being interpreted and applied -- the Voting Rights Act, as amended.

Petitioners stridently oppose the District Court's reliance upon data from elections with both black and white candidates. Pet. for Cert. 7-8. In reality, the District Court considered, but rejected as "spurious at best," the argument that the Voting Rights Act was intended to protect white incumbents. Gretna, 636 F.Supp. at 1120-21. Petitioners are merely trying to cleanse the fact that Gretna's white majority con-

sistently has vetoed black-supported black candidates whenever they have sought office. By insisting upon the use of elections in which there were white candidates only, Petitioners implicitly admit that there was no white support for black candidates. Even though Gretna has a 28 percent black population, and the black community has supported black candidates, no black was ever elected. The white majority simply overwhelmed the black minority every time a black-supported black candidate ran. In other words, prior to the districting ordered in this case black residents in Gretna could have any color representative they wanted . . . so long as he or she was white. See Gretna, 636 F.Supp. at 1121.

2. Plaintiffs Proved The Existence Of The Other Senate Report Factors.

In addition to the three principal Gingles factors, Respondents also established the existence of numerous additional factors specified by the Senate Report for §2 cases.

History of Official Discrimination

Dr. Cassimere testified copiously regarding the sad history of official discrimination, including the inferior instruction provided to blacks in Gretna's segregated schools. The District Court specifically found that "the legacy of this system persists even today. While the majority of whites over age 25 possess a high school education (54%) only 40% of blacks over age 25 are high school graduates." Gretna, 636 F.Supp. at 1118. Moreover, income and employment figures demonstrated the ex-

treme disparity between Gretna's whites and blacks in the socioeconomic conditions engendered by this separate and unequal treatment. Id.

Exclusion From the Crucial Slating Process

The District Court found that election to public office in Gretna was dependent upon a group of elected officials known as the "Miller-White Ticket." Based on the testimony of Edwin Romain, Aldermen Uzee, and others, the District Court found that this candidate slating process systematically excluded blacks from participation. Gretna, 636 F.Supp. at 1123.

Electoral Practices in Gretna Which Enhance Discrimination Against Blacks

At the time of the trial, Gretna used the largest possible election district -- the entire City. Gretna was the most populous Louisiana city to

elect its governing body under an at-large system. In fact, over 90 percent of the municipalities in the state with at-large elections have populations less than one fifth that of Gretna. See Gretna, 636 F.Supp. at 1124. Municipalities much smaller than Gretna have met with difficulty under the Voting Rights Act in attempting to maintain such at-large systems. See, e.g., Monroe v. City of Woodville, 819 F.2d 507 (5th Cir. 1987) (population of 1,512); Wallace v. House, 538 F.2d 1138 (5th Cir. 1976) (population of 5,200), cert. denied, 431 U.S. 965 (1978).

Gretna also has a majority vote requirement which increases minority vote dilution (TR2: 80/17-23). See generally McDonald, The Majority Vote Requirement: Its Use and Abuse in the South, 17 Urb. Law. 429 (1985).

Lingering Effects of Past Discrimination

Dr. Cassimere's testimony indicated that blacks in Gretna continue to suffer the debilitating effects of past de jure and de facto discrimination. Blacks in Gretna have a median income only slightly more than half that of whites; three times as many Gretna black families live below poverty level; and black unemployment is more than twice that of whites. Gretna, 636 F.Supp at 1118.

Lack of Electoral Success by Blacks in Gretna

The District Court found that no black person had ever been elected to public office in Gretna. Indeed, only two black persons had ever run for public office there -- Edwin Romain and Leo Jones (who was twice defeated under the at-large system). Gretna, 636 F.Supp. at 1134. After a black majority district was created in response to the

District Court's decision in this case, Leo Jones was elected to represent that district, becoming the first black ever elected to the Gretna Board of Aldermen.

B. The District Court Correctly Considered Data From Elections In Which Black Candidates Ran For Public Office.

This Court has identified "'the extent to which minority groups have been elected to public office in the jurisdiction'" as one of the two "most important Senate factors bearing on §2 challenges to multimember districts."[11] Gingles, 478 U.S. at 48 n.15. This emphasis "effectuates the intent of Congress" to provide racial and ethnic minorities with access to the political process after more than a century of

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11. The other factor, racially polarized voting, is discussed in Part II.A.1, above.

racially discriminatory election laws and policies. Id.

1. The Courts Below Correctly Examined Elections in Which Minority Candidates Participated.

Petitioners contend that the courts below incorrectly examined only those elections in which minority candidates participated and that this constituted an impermissible focus. Pet. for Cert. 8-14. They seek support for this claim in the following language from Justice Brennan's plurality opinion: "Under §2, it is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate that is important." Gingles, 478 U.S. at 68 (emphasis in original). When this passage is read within the context of the remainder of Justice Brennan's opinion (especially footnote 15), however, it does not (as

Petitioners seem to think) contradict the carefully crafted legal framework which commanded a majority of this Court.

As the Fifth Circuit correctly noted, this portion of Justice Brennan's opinion is "properly interpreted to hold that the race of the candidate is in general of less significance than the race of the voter -- but only within the context of an election that offers voters the choice of supporting a viable minority candidate." Citizens for a Better Gretna v. City of Gretna, 834 F.2d at 503 (emphasis added).

As the District Court found, Gretna's residents do vote along racial lines -- Gretna whites simply do not vote for black candidates, while Gretna blacks do. It is unreasonable for Petitioners now to argue that this dif-

ference can be ascertained without analyzing racial bloc voting in elections where minority candidacies are tenable, especially given Gretna's exclusionary slating process. As observed by the Fifth Circuit, "implicit in the Gingles holding is the notion that black preference is determined from elections which offer the choice of a black candidate." Gretna, 834 F.2d at 503-04. To hold otherwise would be contrary to the clear intent of Congress in passing, and amending, the Voting Rights Act.

2. Other Courts Uniformly Have Considered Probative Evidence of Racially Polarized Voting by White Majorities in Such Elections.

Courts have long accepted the proposition that "elections in which minority candidates have run often provide the best evidence to determine whether votes are cast on racial lines."

Graves v. Barnes, 343 F.Supp. 704, 732 (W.D. Tex. 1972), aff'd in relevant part sub nom. White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). This is especially significant, because Congress viewed the 1982 Amendments as "codifying the leading pre-Bolden vote dilution case, White v. Regester." S. Rep. 2.

Though, prior to Gingles, courts disagreed as to certain aspects of polarized voting, they were united in ruling that the purpose of the inquiry was to determine if voters were in fact voting on the basis of race. As the Fifth Circuit stated: "If racially polarized voting did not exist, white candidates could not expect to retain or achieve office solely because they were white . . . . [B]lack candidates could not be denied office because they were black."

Nevett v. Sides, 571 F.2d 209, 223 n.16 (5th Cir. 1978), cert. denied, 446 U.S. 951 (1980). See also United States v. Marengo County Commission, 731 F.2d 1546, 1566 (11th Cir. 1984) (Wisdom, J.), appeal dismissed and cert. denied, 469 U.S. 976 (1984). In short, "polarized voting confirms that race, at least subtly, remains at issue in the political systems" Jones v. City of Lubbock, 727 F.2d 364, 385 (5th Cir. 1984).

Not only is Petitioners' interpretation untenable, but it would overturn the jurisprudence upon which the 1982 Amendments to §2 and Gingles are founded, as well as the dozens of subsequent cases applying these controlling precedents. Focus upon elections with minority candidacies has consistently been treated as critical in determining

racial polarization. Indeed, it has become the methodology employed by every Court of Appeals that has considered §2 claims since Gingles. See, e.g., United States v. Dallas County, 850 F.2d 1433 (11th Cir. 1988); Campos v. City of Baytown, 840 F.2d 1240, 1248-49 (5th Cir. 1988); Buckanaga v. Sisseton Indep. Sch. Dist., 804 F.2d 469, 470, 476 (8th Cir. 1986). The district courts also have consistently focused upon black-white electoral contests. See, e.g., East Jefferson Coalition v. Jefferson Parish, 691 F.Supp. 991, 1001 (E.D. La. 1988); Smith v. Clinton, 687 F.Supp. 1310, 1316-17 (E.D. Ark. 1988); Buchanan v. City of Jackson, 683 F.Supp. 1515, 1527-28 (W.D. Tenn. 1988); Martin v. Allain, 658 F.Supp. 1183, 1193-94 (S.D. Miss. 1987); Jackson v. Edgefield County,

South Carolina Sch. Dist., 650 F.Supp. 1176, 1197 (D. S.C. 1986).

3. The District Court Correctly Considered Election Data Drawn Solely From Gretna Precincts.

Petitioners insinuate that the Fifth Circuit was "searching on the horizon for evidence of racial polarization." Pet. for Cert. 20. In fact, both of the courts below directly followed this Court's mandate that, where electoral data are sparse, "courts must rely on other factors that tend to prove unequal access to the electoral process." Gingles, 478 U.S. at 57 n.25.

This Court recognized that in some jurisdictions -- such as Gretna -- the evidence of voter polarization needed to establish a §2 violation might be extremely difficult, if not impossible, to gather. Historical discrimination generates a sad legacy of lingering,

current effects upon members of minority groups. Jurisdictions (such as Gretna) which have a history of discrimination may hold little in terms of valid statistical data from which to glean the existence of racial bloc voting.

The depressed socioeconomic status of minority group members deters candidates from undertaking expensive campaigns, especially in large election districts, as existed in Gretna prior to this suit. Furthermore, an exclusionary slating system, also found to exist in Gretna by the District Court, see 636 F.Supp. at 1134, greatly exacerbates this situation.

Under these circumstances, analyzing the electoral behavior of Gretna voters in elections to other offices was also necessary as a supplement to the analysis of the 1973, 1977, and 1979

elections to the Gretna Board of Aldermen. Therefore, the Fifth Circuit correctly allowed evidence of "exogenous"[12] elections to be used to assist in determining if voter polarization existed in Gretna.[13] Such an approach clearly falls within the "flexible" approach mandated by this Court. Gingles, 478 U.S. at 46. The same approach has consistently been utilized by those

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12. The choice of the word "exogenous" to describe these elections is somewhat unfortunate, because it might imply that the vote of voters from outside the challenged system were analyzed. A better terminology would be "indigenous." See BLACK'S LAW DICTIONARY 695 (5th ed. 1979) ("Indigena: . . . one born within the realm, or naturalized by act of parliament."). Of course, all election precincts analyzed by Plaintiffs' experts were "indigenous" in these terms, as only the votes of Gretna voters were considered.

13. Despite Defendants' current, adamant rejection of "exogenous" election data, their expert's testimony also relied on his inquiries into the votes of Gretna voters in city, parish, state, and federal elections. (TR3: 84/17, 95/18, 100/12, 128/16-18, & 134/8).

courts which have confronted the issue. See Campos, 840 F.2d at 1245; Buckanaga, 804 F.2d at 471, 476. See also Windy Boy v. County of Big Horn, 647 F.Supp. 1002, 1011, 1013 (D. Mont. 1986); Major v. Treen, 524 F.Supp. 325, 337-39 (E.D. La. 1983) (three-judge court); Bolden v. City of Mobile, 542 F.Supp. 1050, 1076-77 (S.D. Ala. 1982) (on remand).

Ignoring the great weight of these precedents, Petitioners claim that "a jurisdiction cannot be subject to corruption of blood by the presumed presence of Section 2 violations in neighboring jurisdictions." Pet. for Cert. 20. This rather odd claim ignores that the 1982 Amendments, of course, removed any notion of purposeful discrimination. See, e.g., S. Rep. 17-19, 33-34. Hence, the City of Gretna is not being blamed

for the existence of racial polarization among Gretna's residents. Petitioners' claim also suggests that voting by neighboring jurisdictions has been considered in this case. Of course, it has not. Only the votes of Gretna voters were analyzed. The use of election data in which voters from a particular jurisdiction have voted, even if the election is not for an office exclusively under the challenged electoral structure, is reasonable and, in many cases, necessary.

The use of such data is probative when the aim is to determine the voting patterns within that particular jurisdiction, i.e., whether those voters vote in racial terms. If data are available on an election, even one for an office whose scope is beyond the challenged system, the validity of the results is

not compromised, provided they do not include analysis of the voting patterns of voters outside the challenged jurisdiction.

This is especially appropriate given the agreement by Plaintiffs' and Defendants' experts that racial polarization occurs across the whole range of elections. At trial, Dr. Wildgen admitted that racial polarization is a pervasive phenomenon and should appear in all kinds of elections. (TR3: 84/24).

Petitioners seek solace in White v. Regester, 412 U.S. 755, 770 , 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), which mandates an appraisal of the "past and present reality, political and otherwise." As detailed in Part I.A., above, the District Court here did exactly that when it found: "[t]he historical record of discrimination in the State of

Louisiana and the Parish of Jefferson is undeniably clear and the record suggests it has not ended even now." Citizens for a Better Gretna v. City of Gretna, 636 F. Supp. 1113, 1116 (E.D. La. 1986).

This record of "past reality" has evolved into a "present reality" which, until the judgment in this case, included no blacks ever being elected as aldermen, an at-large electoral system with a majority vote requirement, very few minority candidates, and a racially exclusionary slating process. The number of aldermanic elections available for analysis inevitably has been reduced by the past and present reality in Gretna. Gingles specifically noted: "the fact that statistics from only one or a few elections are available does not foreclose a vote dilution claim." 478 U.S. at 57 n.25.

This Court has stressed a flexibility which dictates the use of "exogenous" election results to assist in making voter polarization analyses. Petitioners, on the other hand, would interpret Gingles so rigidly "that the inability of Gretna's blacks to participate as aldermanic candidates would also function to deprive them of relief under §2." Gretna, 834 F.2d at 502-03.

III. There Is No Conflict Among The Courts Of Appeals Regarding Any Relevant Issue Involved In This Case.

Petitioners next attempt to conjure from thin air a conflict among the Courts of Appeals by misreading (and quoting out of context) a single sentence from Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547 (11th Cir. 1987), cert. denied, 108 S.Ct. 1111 (1988). In Carrollton, the Eleventh Circuit rejected defendants' attempts to

extrapolate the behavior of a county's voters from the behavior of a small municipality's electorate. In fact, that court simply refused to condone the use of municipal elections in which many of the voters in the challenged jurisdiction could not vote.

In the instant case, by contrast, Plaintiffs analyzed elections in which all voters in Gretna -- the challenged jurisdiction -- could vote. The election results analyzed in this case consisted exclusively of Gretna precincts, and, therefore, solely of residents of the challenged jurisdiction. No election results from precincts outside of Gretna were analyzed. Plaintiffs were not examining data on Gretna voters to prove a §2 violation in Jefferson Parish or the State of Louisiana. Plaintiffs proved racially polarized voting among

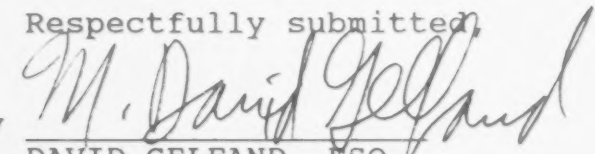
the City of Gretna's citizens by examining data on the City of Gretna's citizens. Indeed, Carrollton itself examined a similar election -- the 1984 Presidential primary. See 829 F.2d at 1556.

CONCLUSION

Petitioners have failed to show that the review they seek on certiorari is anything more than just "another hearing," Magnum Import Co. v. Coty, 262 U.S. 159, 163, 43 S.Ct. 531, 67 L.Ed. 922 (1923), and their arguments reflect a poor appreciation of this Court's awesome responsibility. See Ross v. Moffitt, 417 U.S. 600, 617, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974) (discretionary review depends on factors other than losing party's perception of judgment).

Respondents respectfully urge this Court to deny the Petition, as it raises no significant issue worthy of this Court's attention, and it presents no conflict among the Courts of Appeals.

Respectfully submitted,

By 

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